In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 868

JOHN HENRY SHOFFEITT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1968. The petition for a writ of certiorari was filed on December 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the privilege against self-incrimination is a defense to a prosecution for the possession of distilled spirits in containers not bearing the required

tax stamp, in violation of 26 U.S.C. 5205(a)(2), 5604(a)(1).

STATUTES INVOLVED

26 U.S.C. 5205(a)(2), provides, in pertinent part:

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. * * *

26 U.S.C. 5604(a)(1) provides in pertinent part:

> Any person who shall (1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section * * * shall be fined not more than $10,000, or imprisoned not more than five years, or both, for each such offense.

STATEMENT

After jury trials on two indictments in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of possessing and selling distilled spirits in unstamped containers, in violation of 26 U.S.C. 5205(a)(2), 5604(a)(1), and on one count of concealing distilled spirits on which the required tax had not been paid, in violation of 26 U.S.C. 5601(a)(12).[1] He was sen-

[1] Indictment No. G-5533 charged petitioner in two counts with violations of 26 U.S.C. 5604(a)(1) (R. 1-2). He was convicted on the first count, and acquitted on the other. Indictment No. G-5531 charged petitioner with one violation of 26

tenced to imprisonment for fifteen months.[2] On a consolidated appeal, the court of appeals affirmed both convictions (Pet. App. A).

The government's evidence (the sufficiency of which petitioner concedes [Pet. 4]) showed that on the afternoon of September 9, 1966, federal agent James Parmley and two others went to the petitioner's house and asked him if he had any liquor for sale. Petitioner walked off into a vacant field and returned with a half-gallon of moonshine whiskey, which he sold to Parmley for five dollars. There were no tax stamps attached to the bottle (R. 10–11, 60–63).

In the evening of December 2, 1966, federal agent Bobby Newsome and another drove to petitioner's home and asked him if he had any liquor to sell. After some negotiation, petitioner agreed to sell two cases for $45 a case. Petitioner and Newsome drove around petitioner's house to an abandoned automobile. Petitioner removed two cases of moonshine liquor from its trunk and sold them to Newsome (R. 136–139).

ARGUMENT

This Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, are in-

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U.S.C. 5604(a)(1), and one violation of 26 U.S.C. 5601(a)(12) (R. 129). He was convicted on both counts. He does not challenge his conviction under 26 U.S.C. 5601(a)(12).

[2] Petitioner was given a general sentence of 12 months on his conviction on Indictment No. G–5533, and 15 months on his conviction on Indictment No. G–5561, the latter sentence to run concurrently with that imposed on Indictment No. G–5533 (R. 131–132).

applicable to petitioner's convictions under 26 U.S.C. 5205(a)(2), 5604(a)(1) for possession and sale of whiskey in unstamped containers. As the court below noted, these statutes proscribe only a course of conduct—*i.e.*, the possession or sale of distilled spirits in containers to which tax stamps have not been affixed. They do not proscribe the failure to register or pay a tax. Indeed, the only person required to pay the tax and affix a stamp to the container is the original distiller. See 26 U.S.C. 5205; 26 C.F.R. 201.334. Petitioner does not claim to have been the distiller; his only duty was to refrain from taking possession of or selling distilled spirits in containers which had not been properly stamped. Thus, the question whether the Fifth Amendment privilege against self-incrimination provides a defense to a prosecution based upon failure to pay the tax does not arise.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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